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No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

THE PEOPLE OF THE STATE OF CALIFORNIA

Petitioner,

v.

LEE PERRY FARMER, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether penalty phase argument by the prosecutor that is not misleading, but focuses the jury on its obligation to only consider the relevant facts and applicable law rather than vague social issues as to whom should live or die so the jury does not act in an arbitrary and capricious manner as condemned by this Court in *Furman v. Georgia* (1972) 408 U.S. 238, and *California v. Brown* (1987) 479 U.S. 538, violates the mandate of this Court in *Caldwell v. Mississippi* (1985) 472 U.S. 320.

2. Whether a reviewing court may find one phrase of the prosecutor's argument constituted prejudicial penalty phase error without an analysis of the overall nature of final arguments of the prosecutor and the defense, the instructions given, and the evidence presented as mandated by this Court in *California v. Brown*, *supra*, 479 U.S. at pages 542-543.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, State of California respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Supreme Court of the State of California issued on January 12, 1989, affirming the judgment as to guilt and the special circumstances

and reversing the judgment insofar as it relates to the penalty of death.[1]

OPINIONS BELOW

The opinion of the California Supreme Court (*People v. Farmer* (1989) 47 Cal.3d 888 appears as Appendix A of this petition. A copy of the California Supreme Court's order denying the petition for rehearing without opinion appears as Appendix B.

JURISDICTION

The judgement of the California Supreme Court was filed on January 12, 1989. A timely petition for rehearing by petitioner was denied on February 23, 1989. This petition is filed within 60 days of that judgment and is therefore timely. This Court's

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1. The parties to the proceedings below were petitioner, the People of the State of California (plaintiff and respondent below), and respondent, Lee Perry Farmer, Jr. (defendant and appellant below).

jurisdiction is invoked under 28 U.S.C. section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendments Five, Eight, and Fourteen; California Penal Code sections 190.2, subdivision (a)(17)(vii), 190.3.

STATEMENT OF THE CASE

Respondent Lee Perry Farmer, Jr. was charged in an information with murder (Pen. Code, § 187), two counts of burglary (Pen. Code, § 459), and three prior felonies. As a special circumstance it was alleged the murder occurred during the commission of a first degree burglary (Pen. Code, § 190.2, subd. (a)(17)(vii); *People v. Farmer* (1989) 47 Cal.3d 888, 900.)

A jury found respondent guilty of first degree murder and two first degree burglaries. It further found the special

circumstance was true, that respondent had personally killed the victim, and that the murder was committed with premeditation and deliberation. At the penalty phase the jury fixed the punishment at death and the court sentenced respondent accordingly. (*People v. Farmer*, *supra*, at pp. 900, 901.)

On January 12, 1989, the California Supreme Court affirmed the guilt findings and the special circumstances, but reversed the penalty because the prosecutor's argument was contrary to the decision of this Court in *Caldwell v. Mississippi* (1985) 472 U.S. 320.

STATEMENT OF FACTS

Victoria Huffman lived with her husband Charles Huffman. Respondent came over and indicated someone owed him money. The debt was drug related. The Huffmans' knew where this individual resided as they had worked in the building.

At some point respondent and Charles Huffman left, and returned later. Respondent then gave Mrs. Huffman money so she could buy "bullets and beer" for him. She bought Winchester .41 magnum ammunition and returned to the residence. (RT 2645, 2669-2670, 2567-2573.)

After she returned, respondent and Huffman left. They returned a little while later with a stereo, a suitcase, and items such as jewelry, a credit card and a gun. She told them to remove the property as she felt it had been stolen. The property was taken out to a van. She fell asleep and did not awake until 5:00 a.m. the next morning when her husband left for work. (RT 2575-2580.)

Respondent eventually took the stereo (Peo. 24-25) to the residence of Victoria Huffman's mother-in-law (RT 2581-2654). The stereo was taken by Charles Huffman to

a residence in the Big Bear area. (RT 2679-2680.)

On June 12, 1981, Lloyd Reed and Erich Schmidt-Till resided at the Diana Avenue Apartments. A neighbor noted the lights were on in the apartment between 11:30 to 12:00 at night and felt someone was home. (RT 2083-2089.) A co-worker dropped Erich Schmidt-Till off at his apartment at about 1:00 a.m. (RT 2075-2076.)

A little after 4:00 a.m. a neighbor was awakened by a moaning sound coming from Schmidt-Till's apartment. He noted the window was open and the screen was off the window of the apartment. He also saw Schmidt-Till lying on the floor and the police were summoned. (RT 2119-2125.)

A little earlier another neighbor had been awakened by the sound of what seemed to be three shots. Two were close together and there was a pause before the

third one. (RT 2125-2155.) Police also received a call at around 4:10 from a female. She said her brother had called to tell her he had been shot. (RT 2209, 2236-2238.)

The police dispatcher called Erich. She was told he had been shot three times in the mouth and the stomach. He indicated the shooter was a white male about 35 years old, but he could not remember the shooter's name. The police were told by Erich he was in pain and the dispatcher stayed on the line until officers arrived. (RT 2228-2234.)

At about 4:30 a.m., police arrived at the apartment of Erich Schmidt-Till at 10601 Diana, #487. They found Erich lying on the floor next to the bed. He was using the phone and was bleeding from the chest area, the head area, and his hand.

Officer Stigotte asked Erich if he knew who had shot him and Erich said he

did. He described the person as a male caucasian, weighing about 160 pounds, and about 5'11". Erich was unable to remember the shooter's name. However, he asked the officer more than once to give him the phone book which had the shooter's name in it. The officer was unable to find the book. He also said the shooter had been a friend of his roommate Lloyd.

Erich also indicated he had been sleeping in his bedroom, heard a noise, and got up. He confronted an individual in his residence, asked the individual what he was doing there, and the individual, without saying anything, shot him. Erich felt the individual had been there to take the drugs of his roommate Lloyd. (RT 2248-2260.)

Erich Schmidt-Till died and an autopsy was conducted on his body on June 13, 1981. (RT 2316.) A gunshot wound to the victim's hand was observed. It

appeared the bullet entered the palm of the hand and exited through the rear portion of the hand. (RT 2316-2318.) There were two wounds associated with the right cheek. There was a one inch wound between the right ear and the right corner of the mouth. This was an entrance wound for a bullet. There was an exit wound in back of the neck on the right. There was also an entrance and exit wound to the left wrist. (RT 2318-2324.)

A gunshot wound was also located on the right side of the chest near the abdomen. The bullet entered there and exited through the left side of the back. (RT 2324-2325.) This bullet passed through the liver and major arteries. (RT 2325.)

There was another wound to the right side of the victim's mouth. The bullet making the wound broke the jawbone on the right side. (RT 2327-2328.)

The autopsy surgeon concluded it was possible the five separate wounds had been caused by only three bullets. The bullets could have passed through the hands while they were in a defensive position and then entered the body. (RT 2333-2334.)

Death was caused by injuries to the liver, the hepatic vein, and the inferior vena cava when the bullet passed though these structures. (RT 2333-2339.)

Meanwhile, police examined the murder scene. On the morning of June 13, 1981, one expended bullet was found in the hallway and another expended bullet was found in a linen cabinet in the hallway. (RT 2374-2375.) The next day a third bullet was found in a hallway. (RT 2376.) Examination also revealed the front door of the residence had been forced open. (RT 2402.)

Various foot impressions were located outside the residence of the victim.

(RT 2413.) Some of the foot impressions belonged to Huffman. (RT 2726-2737.) Other footprints at the scene belonged to respondent. (RT 2745-2747.) The bullets found at the scene were similar to those purchased by Mrs. Huffman on the night of the murder. (RT 2756-2768, 2669-2670, 2644-2646.)

Lloyd Reed returned to his residence the morning after the murder of his roommate Erich and determined various items of property were missing. These items included two briefcases, a pair of binoculars, a camera, a portable wet bar, a revolver, jewelry, a jewelry box, and a credit card. Other items missing included a .41 magnum Ruger. A stereo receiver and turntable were also missing. (RT 2488-2490; Peo. 24-25.)

Lloyd told law enforcement officials he had engaged in the sale of amphetamines before the murder. He owed respondent

$500 because of various drug transactions. At the time of the murder the money had been due for a couple of months. (RT 2493-2495.) Respondent had talked with Lloyd Reed the day before the murder about Reed's debt. (RT 2495-2496.)

In June of 1981, respondent was driving a 1972 orange camper van. (RT 1661-1662.) Respondent was arrested a few days after the murder. Boot he was wearing were seized at this time. (RT 2696-2699.) A search warrant was obtained for the residence in the Big Bear area. A search of the residence turned up the stolen stereo receiver that had been left there by Huffman. (RT 2679-2680, 2699.) An expended bullet was also located in a search of the Dodge van respondent had been using. (RT 2699-2700, 2702.)

Police later determined the phone book Schmidt-Till had referred to was a

yellow pad with a list of names maintained by Reed. Three persons on this list fit the general description of Schmidt-Till's assailant, one of them was respondent. (*People v. Farmer, supra*, RT 2501-2513, 2519.)

Respondent's name also appeared in the book but Huffman's did not. (RT 2501-2513, 2319.)

The bullet located in the van was indistinguishable in composition from the expended bullets found at the murder scene according to an expert for the FBI. (RT 2699-2702, 2264, 2831-2832.) Evidence also established Huffman did not have access to a car at the time of the murder because his car was broken. (RT 2687-2690.) Huffman lived some distance from the murder scene. (RT 2704.)

THE DEFENSE

A doctor testified that due to traumatic injury to the brain because of

the gunshot wounds and due to the circumstances surrounding the shooting, Erich Schmidt-Till's statements as to what had happened could not have been accurate. (RT 2952-2978, 2987-2994.)

REBUTTAL

Dr. Modglin indicated while the victim did suffer brain damage, he felt the damage was not significant if the victim could talk and answer questions intelligently. (RT 3297-3298.) Erich's mother testified her son-in-law called to say Erich had called to indicate he had been shot three times. (RT 3307-3308.)

PENALTY PHASE EVIDENCE

It was stipulated respondent had suffered prior felony convictions for grand theft, receiving stolen property, and escape. (RT 3645-3646.) Respondent presented testimony from various witnesses which indicated he had no prior history of violence. While he had engaged in

substance abuse, he had always been a nice person and was even cooperative with the police. (RT 3662-3675, 3677-3685, 3689-3695.)

He also presented evidence indicating he had not been the killer. Respondent's attorney testified Huffman admitted to him that he had been the shooter. (RT 3927-3935.)

Respondent testified he and Huffman went to Lloyd Reed's because Reed had owed him money. They eventually went into the apartment when they detected no one was there. They took property since Reed owed respondent money. They returned to Huffman's house and he had his wife go to the store to get bullets and beer. She brought back .41 magnum bullets. They went to a remote area and tried out the gun. They returned to Lloyd's residence.

Huffman wanted to go inside and look for marijuana. He returned later with a

suitcase. Huffman went inside, came out, said he had shot someone inside, and they left. Respondent buried the gun. Respondent only went into the apartment one time and did not shoot the victim.

He also admitted he had suffered the prior felony convictions and indicated he was willing to accept the death penalty if it was imposed. (RT 3960-3980.)

The prosecutor, in rebuttal, presented a taped interview with Huffman while he was in Chino after his burglary conviction in this case. On the tape he claimed respondent was the shooter. (RT 4017-4030.)

HOW THE FEDERAL QUESTIONS ARE PRESENTED

This case raises two important federal questions. The first question involves whether argument by the prosecutor was contrary to the decision of this Court in *Caldwell v. Mississippi* (1985) 472 U.S. 320.

During final argument at the penalty phase the prosecutor advised the jury that whether or not respondent should live or die was decided by the voters when they passed the death penalty law. As jurors they were to decide whether the aggravating factors outweighed the mitigating factors. They were not to decide life or death. The law does that. (*People v. Farmer*, *supra*, at p. 928.)

Although no objection was raised to this argument in the trial court, the California Supreme Court concluded this argument violated the rule announced in *Caldwell v. Mississippi*, *supra*, as it

diminished the jury's sense of responsibility. Petitioner objected to this conclusion in a rehearing petition, and also complained that *Caldwell* error should not be considered for the first time on appeal, but the court denied the petition. Thus, this case squarely presents an issue of whether argument that is not misleading, but in a lawful manner attempts to limit the jury's sense of responsibility so it only considers the applicable facts and law and does not act in an arbitrary fashion (see e.g. *Furman v. Georgia*, *supra*; *California v. Brown*, *supra*), violates *Caldwell*.

The second issue involves whether the California Supreme Court correctly reviewed the record of the penalty phase to find the prosecutor's argument amounted to prejudicial error.

The court essentially focused on specific phrase of the prosecutor's

argument to be prejudicial error without evaluating the total argument and evidence presented at the penalty phase in the manner indicated by this Court in *California v. Brown* (1987) 479 U.S. 538. Petitioner specifically objected on this ground in the petition for rehearing, but the court denied the petition. Thus, this case also presents an important issue regarding the method of appellate review for error at the penalty phase after *California v. Brown, supra.*

REASONS FOR GRANTING THE WRIT

I

THE INSTANT CASE RAISES A FEDERAL CONSTITUTIONAL QUESTION

Initially it should be noted that while the California Supreme Court refers to California cases such as *People v. Milner* (1988) 45 Cal.3d 227, and *People v. Brown* (1985) 40 Cal.3d 512, 538-544, reversed on other grounds sub nom *California v. Brown* (1987) 479 U.S. 538, in discussing why the prosecutor's argument was improper, the court essentially relied on the decision of this Court in *Caldwell v. Mississippi* (1985) 472 U.S. 320 as the basis for overturning the penalty on the ground the prosecutor's argument misled the jury as to it's sense of responsibility. (*People v. Farmer* (1989) 47 Cal.3d 888, 924-930.) Moreover, the *Milner* case was simply a discussion of *Caldwell* error.

Furthermore, to the extent the *Milner* decision and the decision here refer to *Brown*, they refer to the discussion in *Brown* dealing with the jury's sense of responsibility in making the penalty determination in light of *Caldwell*. (*People v. Milner*, *supra* 45 Cal.3d at p.256.) Indeed, the portion of *Brown* cited in this case and *Milner* dealt with California Jury Instructions , CALJIC 8.84.2. The state supreme court invalidated the instruction because it did not leave the jury with the sense of responsibility for determining the penalty as mandated in *Caldwell* and other decisions of this Court. (*People v. Brown*, *supra*, 40 Cal.3d at pp. 538-545, & fn. 17.)

Thus, the citation to *Brown* or *Milner* does not mean the case was decided on any independent state ground. The prosecutor's conduct was found to violate

the constitutional mandate of *Caldwell*.

Consequently, the penalty reversal was on federal constitutional grounds and petitioner's attack on this reversal thus raises federal constitutional issues. (*Michigan v. Long* (1983) 463 U.S. 1032, 1040-1041; *Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 327.)

> "Moreover, we will not assume that a state-court decision rests on adequate and independent state ground when the state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not

clear from the face of the opinion. (*Michigan v. Long* 463 U.S. 1032, 1040-1041 (1988).)" *Caldwell v. Mississippi, supra,* 472 U.S. 327.)

II

THE CALIFORNIA SUPREME COURT'S INTERPRETATION OF *CALDWELL V. MISSISSIPPI* IS TOO BROAD AND GIVES A JURY TOO MUCH DISCRETION CONTRARY TO THE DECISIONS OF THIS COURT IN *FURMAN V. GEORGIA* (1972) 408 U.S. 238 AND, *CALIFORNIA V. BROWN* (1987) 479 U.S. 538

Certiorari first should be granted as the California Supreme Court's interpretation of *Caldwell v. Mississippi*, *supra*, 472 U.S. 320 reads *Caldwell* too broadly and could give the jury too much discretion contrary to the decisions of this Court in *Furman v. Georgia*, *supra*, 408 U.S. 238 and *California v. Brown*, *supra*, 479 U.S. 538.

In this case the Supreme Court of California focused on a specific passage of argument by the prosecutor and because of that passage of argument reversed the penalty phase.

The passage at issue reads as follows:

> "Whether or not Mr. Farmer should live or die was decided by the voters of this state when they passed this law, when they set the criteria. They decided who lives and who dies. You decide does aggravating outweigh mitigating? That is your job. That is all you decide. The law does the rest. It is not you. You are unfortunately picked here to do that which has to be done, decide whether or not aggravating outweighs mitigating. You do not decide life or death. The law does that." (*People v. Farmer*, *supra*, 47 Cal.3d at p. 928.)

Three justices of the court held this argument violated *Caldwell v. Mississippi*, *supra*, 472 U.S. 320 and state court decisions interpreting *Caldwell* because the jurors were told the awesome responsibility for the life and death determination did not rest with them. (*People v. Farmer*, *supra*, 47 Cal.3d at p. 931.)

In a separate concurring opinion a fourth justice (Justice Eagleson) focusing solely on the comment regarding life or death, also concluded the comment misled the jury as to it discretion and responsibility. (*Id.*, at p. 933.)

The dissent, evaluating the whole record of the penalty phase, found no *Caldwell* error. (*Id.*, at p. 936.)

A majority of the California Supreme Court has read too much into the *Caldwell* decision of this Court and certiorari thus should be granted in this case to clarify

the holding in *Caldwell*.

In *Caldwell*, the prosecutor urged the jury not to view itself as finally determining whether the petitioner would die because the death sentence would be reviewed for correctness by the Mississippi Supreme Court. Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, wrote the lead opinion holding that the uncorrected suggestion that the jury's responsibility for any ultimate determination of death will rest with others presented the danger that the jury will choose to minimize the importance of its role, especially when the jury is told that an alternative decision maker is the state's highest court.

Justice Powell did not participate in the case and then Chief Justice Burger,

Justices Rehnquist, and White dissented. (*Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 343.)

Justice O'Connor provided the crucial fifth vote reversing the penalty by joining with the majority. Justice O'Connor agreed with the majority only because she concluded the prosecutor's remarks were impermissible because they were inaccurate and misleading in a sense that diminished the jury's sense of responsibility. (*Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341.)

Thus, the majority holding in *Caldwell* does not rest only on a vague question of whether the prosecutor's argument diminished the jury's responsibility, but that the remarks were inaccurate and misled the jury as to its responsibility.

Indeed, in the recent decision of this Court in *Dugger v. Adams* ___ U.S. __, 57 U.S.L.W. 4277, filed February 28, 1989, five justices of this Court characterized *Caldwell* as holding that "remarks by the prosecutor in a capitol case that misinformed the jury as to the role of appellate review violated the Eighth Amendment." (*Dugger v. Adams*, *supra*, 57 U.S.L.W. 4277.) "To establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." (*Id.*, at 4278.)

Caldwell rests on the assumption the prosecutor gave the jury misleading information that improperly misled the jury as to its role. It does not hold, as the California Supreme Court concludes, that any comment that might diminish the jury's sense of responsibility violates *Caldwell*. Thus, the California Supreme

Court has read *Caldwell* too broadly.

Indeed, this interpretation by the California Supreme Court runs afoul of the decisions of this Court in *Furman v. Georgia, supra*, 408 U.S. 238, and *California v. Brown, supra*, 479 U.S. 538.

In *Furman v. Georgia, supra*, 408 U.S. 238 and *California v. Brown, supra*, 479 U.S. 538, 541, this Court noted that sentencers may not be given unbridled discretion in determining the fates of those charged with capital offenses. The constitution instead requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion.

In *California v. Brown, supra*, this Court upheld an instruction advising a jury not to be swayed by mere sympathy, passion, prejudice, and other emotions. This Court concluded that by limiting the

jury's sentencing considerations to evidence before it relating to the offense and the offender the instruction serves the useful purpose of cautioning the jury against reliance on extraneous emotional factors and thereby fosters the Eighth Amendment's need for reliability in death sentence determination and ensures the availability of meaningful judicial review.

Thus, consistent with *Brown*, *Furman*, and *Caldwell*, accurate argument by the prosecutor that limits the jury's unlimited sense of responsibility by focusing it on its legal duties would certainly be proper, indeed beneficial.

The prosecutor's argument here was consistent with *Brown*, *Furman*, and *Caldwell*. It accurately focused the jury on its job under California law which was to determine whether the aggravating factors outweighed the mitigating factors

and not on vague issues of whether under general social mores or other extraneous matters respondent should receive the death penalty. (See CALJIC 8.84.1; Pen.Code, § 190.3.) The prosecutor told the jury, in essence, the voters had already set the general criteria for the death penalty and told the jury it was thus not their function to consider vague social, moral, and ethical issues, but to determine, as they were instructed, whether the facts of the case supported imposition of the death penalty.

It is true that in *People v. Brown*, *supra*, 40 Cal.3d 512, the California Supreme Court indicated the jury must be advised that its function is not to automatically weigh these factors, but to determine whether death is the appropriate punishment. However, the comments of the prosecutor here within the context of the remainder of his argument that the jury

could consider mercy and justice to the defendant could hardly be understood by the jury to require them to mechanically weigh the aggravating and mitigating factors. (*People v. Farmer*, *supra*, 47 Cal.3d at p. 926-928.) Rather, it would be understood, as noted, to require the jury to focus on the applicable facts and law rather than vague social concepts and mores about whether the death penalty was warranted. Such arbitrary discretion would run afoul of the United States Constitution. (*Furman v. Georgia*, *supra*, 408 U.S. 238; *California v. Brown*, *supra*, 479 U.S. 538.)

Thus, the prosecutor's argument was consistent with the decisions of this Court in *Furman* and *Brown*. The state court concluded, however, that the argument violated *Caldwell* because it diminished the jury's sense of responsibility. However, the position of

the California Supreme Court that any argument which diminishes the jury's responsibility runs afoul of *Caldwell* is simply not correct as petitioner has pointed out.

A jury with unlimited responsibility to do as it sees fit, is a jury with no standards and one whose decision making power would be arbitrary and capricious. Thus, consistent with *Brown* and *Furman* it is proper, and indeed advisable, for the prosecutor to limit the jury's unfettered sense of responsibility by telling the jury the limits of its authority, i.e., to determine whether aggravating circumstances outweigh mitigating circumstances.

Moreover, such comment by the prosecutor does not run afoul of *Caldwell*. For, as noted, *Caldwell* does not proscribe

all comment that limits the jury's sense of responsibility.

As this Court noted in *Darden v. Wainwright* (1986) 477 U.S. 168, 184, at footnote 14:

> "*Caldwell* is relevant only to certain types of comment-those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision. In this case, none of the comments could have had the effect of misleading the jury into thinking that it had a reduced role in the sentencing process. If anything, the prosecutor's comments would have had the tendency to <u>increase</u> the jury's perception of its role." (Emphasis in original.)

Consequently, as the California Supreme Court's interpretation of *Caldwell* is incorrect and its decision reads *Caldwell* too broadly, certiorari should be granted.

III

THE CALIFORNIA SUPREME COURT ALSO DID NOT ANALYZE THE PROSECUTOR'S COMMENT IN THE MANNER SUGGESTED IN *CALIFORNIA V. BROWN*

Certiorari should also be granted as the California Supreme Court did not analyze the prosecutor's comments in the manner suggested by this court in *California v. Brown, supra,* 479 U.S. 538.

In *California v. Brown, supra,* this Court analyzed the constitutional validity of the California instruction advising the jury not to be swayed by mere sympathy and other emotions. In upholding the instruction the court did not look only at the technical wording of the instruction, but at the context in which the instruction was given. For example, in rejecting the defendant's narrow reading of the instruction the court observed that:

> "While strained in the abstract, respondent's interpretation is

simply untenable when viewed in light of the surrounding circumstances. This instruction was given at the end of the penalty phase, only after respondent had produced 13 witnesses in his favor. Yet respondent's interpretation would have these two words transform three days of favorable testimony into a virtual charade. We think a reasonable juror would reject that interpretation, and instead understand the instruction not to rely on 'mere sympathy' as a directive to ignore only the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase." (*California v. Brown, supra*, 479 U.S. at p.

542.)

While *Brown* dealt with review of an instruction, this analysis applies equally well when other types of error are alleged to have occurred t the penalty phase. Indeed, before this case, the California Supreme Court appeared to use this standard for reviewing error at the penalty phase for arguments of counsel or instructions.

> "When the issue is not whether erroneous instructions have been cured by argument, but whether the interplay of argument with individually proper instructions produced a distorted meaning, it seems appropriate to evaluate the remarks of both counsel to determine whether the jury received adequate information. We have so assumed in several

opinions since *California v. Brown*. (*People v. Odle* (1988) 45 Cal.3d 386, 418-419, 420-421 [citations], see *People v. Hamilton* (1988) 45 Cal.3d 351, 371 [citations], *People v. Milner*, (1988) 45 Cal.3d 227, 256 [citations].)" (*People v. Brown* (1988) 45 Cal.3d 1247, at p. 1256.)

The problem in the instant case is that the state supreme court never undertook a review of the entire record of the penalty phase, including the evidence presented, the instructions given, and the overall presentation of the prosecutor's argument. Instead, the court focused only on selected comments of the prosecutor as a basis for reversing the penalty phase on *Caldwell* error grounds.

Indeed, Justice Eagleson's opinion noted that until his closing remarks, the

prosecutor's argument was, for the most part, unobjectionable. Moreover, his explanation to the jury of the scope of its sentencing responsibilities and discretion complied fully with *People v. Brown*, *supra*, 40 Cal.3d at pp. 538-544. (*People v. Farmer*, *supra*, 47 Cal.3d at pp. 931-933.) Similarly, the lead opinion of Justice Mosk indicates the court did not evaluate the overall context of the argument and the entire penalty phase. Rather, the court focused solely on comments of the prosecutor that it found objectionable. (*People v. Farmer*, *supra*, 47 Cal.3d 888.)

A review of the penalty phase as a whole as mandated by *Brown* shows there was no *Caldwell* error here. First, the prosecutor advised the jury that their weighing of the mitigating and aggravating factors was not a mechanical process or a mathematical one. He told the jury the

law doesn't say simply count up factors. It does not tell jurors which of these the jurors should find most weighty or most important. "This is something you have to determine with the help of your fellow jurors, something you will have to determine by use of your common sense." (Panelli, J., dissenting, *People v. Farmer, supra*, 47 Cal.3d at pp. 933-936.) The prosecutor also commented at one point that the jury was there to apply the law and to fairly and justly apply the law. (Panelli, J., dissenting, *People v. Farmer, supra*, 47 Cal.3d 888.) He also told the jury that it was not to decide the case as robots and the law was not to be applied mechanically. Rather, the law had mercy in it as well and that was what mitigation and aggravation was all about. (Panelli, J., dissenting, *People v. Farmer, supra*.) He also told the jury that the law gave them guidance, but it

was not too structured. The jurors did have discretion. (*People v. Farmer, supra*, 47 Cal.3d 888.)

Moreover, the record shows the prosecutor's total closing argument covered about 41 pages of transcript. Of this total, his argument dealing with the circumstances of the crime covered 30 pages while 9 pages dealt with a discussion of the factors of aggravation and mitigation. The portion the majority find misleading covers less than an page and a half. (Panelli, J., dissenting; *People v. Farmer, supra*, 47 Cal.3d at 936.)

In addition, the prosecutor also discussed the factor (k) in CALJIC 8.84.1 which advised the jury it could consider any other circumstance that extenuates the

gravity of the crime even though not a legal excuse for the crime. (cf. *California v. Brown, supra*, 479 U.S. 538.)

In this regard he noted:

"This law has mercy built into it, ladies and gentlemen. This law is not an eye for an eye. This law is justice with mercy, it warranted. That is the way it is drafted. This is why we have a penalty phase. That is why we are weighing aggravation and mitigation, as a safety valve they throw in the last one. Anything else anyone can think of to mitigate this crime." (RT 4130-4131, emphasis added.)

Furthermore, defense counsel advised the jury during his argument that mercy

was something it could consider. (RT 4145.) In addition, respondent himself addressed the jury and, in an apparent attempt at reverse psychology, asked the jury to impose the death penalty because he was innocent of the underlying crimes. (RT 4151.)

Thus, a review of the entire context in which the prosecutor made his argument reveals the jury's sense of heightened responsibility would not be diminished by the comments of the prosecutor the court focused on. It is not reasonable to believe the jury would not know it had a weighty and important decision to make in determining life or death when the prosecutor told the jury it consider mercy, that the law was not to be applied mechanically, and the jury could assign it's own weight to each of the aggravating and mitigating factors. This is particularly true as defense counsel asked

for mercy and respondent himself appeared in front of the jury to ask for the death penalty.

Moreover, there was nothing inaccurate about the prosecutor's comments since the jury's job under California law is to determine whether aggravating circumstances outweigh the mitigating circumstance. (CALJIC 8.84.2; Pen. Code, § 190.3.) It is true the jury is not to make this determination in a mechanical sense, but is to determine whether the penalty is appropriate in light of the applicable facts and law. (*People v. Brown*, *supra*, 40 Cal.3d 512, 538-545, & fn. 17 & 19.) However, nothing in the prosecutor's argument suggested this weighing was a mechanical process. Rather, the overall nature of his argument was that the jury should not focus on irrelevant matters, but upon the applicable facts and laws in conjunction

with mercy and consideration of "Anything else anyone can think of to mitigate the crime." (RT 4130-4131.)

Given all these comments, including respondent's plea to the jury, it cannot be said the jury was unaware of the awesome responsibility it had in this case to determine whether the death penalty was appropriate.

Moreover, the jurors could reasonably conclude the prosecutor's arguments that they were not to decide life or death merely meant the voters had already set the various criteria for the death penalty law, but that each juror had to apply the applicable criteria in a manner that carefully considered the weighty factors involved in the life or death equation. As this Court noted in *California v. Brown*, *supra*, 479 U.S. 538, in a different context, to conclude the prosecutor's comments made the jury feel less

responsible for it decision would have made everything he said and did up to that point a charade. (*California v. Brown*, *supra*, 479 U.S. at p. 542.)

Similarly, in this case the conclusion by a majority of the state court the prosecutor's comments would have diminished the jury's sense of the import of its decision is inconsistent with the entire tenor and nature of the penalty argument by both counsel and respondent himself.

Thus, the prosecutor's comments did not limit the jury's sense of responsibility. Moreover, to the extent the comments did limit the jury's focus to the applicable facts and law, it was proper argument under *Furman* and *Brown*. It also did not violate *Caldwell* as the comments did not give the jury false or misleading information.

Accordingly, as the decision of the

California Supreme Court did not follow the mandate of this Court's decision in *Brown* and evaluate the whole record to determine whether error occurred, certiorari should be granted in this case.

CONCLUSION

Therefore, it is respectfully requested the petition for certiorari be granted.

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JMB:bjr
3-24-89

APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

No. _____

People of the State of California *vs.* Lee Perry Farmer, Jr.

(Petitioner or Appellant) (Respondent or Appellee)

The Clerk will enter my appearance as Counsel of Record for People of the State of California

(Please list names of all parties represented)

who IN THIS COURT is ☒ Petitioner(s) ☐ Respondent(s) ☐ Amicus Curiae ☐ Appellant(s) ☐ Appellee(s)

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature J. M. Bloom

(Type or print) Name Jay M. Bloom

☒ Mr. ☐ Ms. ☐ Mrs. ☐ Miss

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ONLY COUNSEL OF RECORD SHALL ENTER AN APPEARANCE. THAT ATTORNEY WILL BE THE ONLY ONE NOTIFIED OF THE COURT'S ACTION IN THIS CASE. OTHER ATTORNEYS WHO DESIRE NOTIFICATION SHOULD MAKE APPROPRIATE ARRANGEMENTS WITH COUNSEL OF RECORD.

ONLY ATTORNEYS WHO ARE MEMBERS OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES MAY FILE AN APPEARANCE FORM.

IT IS IMPORTANT THAT ALL REQUESTED INFORMATION BE PROVIDED.

CO-73A

AFFIDAVIT OF SERVICE BY MAIL

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No:
October Term, 1988

PEOPLE OF THE STATE OF CALIFORNIA
Petitioner,

v.

LEE PERRY FARMER, JR.
Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within PETITION FOR WRIT OF CERTIORARI JUDGEMENT as follows: To Joseph F. Spaniol, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

James F. Johnson, Esq.
1275 Market Street, Suite 1300
San Francisco, California 94103-1424

California Supreme Court
Robert Wandruff, Clerk
350 McAllister Street, Room 4250
San Francisco, California 94102

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 28th day of March, 1989.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, March 28, 1989.

Barbara Renfrow
BARBARA RENFROW

Subscribed and sworn to before me this 28th day of March, 1989.

JEAN M. FURNS
NOTARY PUBLIC - CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Sept. 17, 1991

Jean M. Furns
Notary Public in and for said County and State